In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 231

COWELL PORTLAND CEMENT COMPANY,
a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Cowell Portland Cement Company, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, Cowell Portland Cement Company, a California corporation, has at all times herein relevant owned and operated a plant for the manufacture of cement at Cowell, Contra Costa County, California.

On July 17, 1937, Local No. 356 of International Union, Mine, Mill & Smelter Workers of America, hereinafter at times referred to as the C.I.O. Union, filed with the National Labor Relations Board, hereinafter at times referred to as the Board, a charge that petitioner had engaged and was engaging in unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C.A., §158. On August 20, 1937, based on said charge and a supplemental charge, the Board issued a complaint against petitioner. Hearings were had and on September 6, 1938, the Board made and filed an order against petitioner. On February 6, 1939, the Board petitioned the United States Circuit Court of Appeals, Ninth Circuit, for the enforcement of said order. The Court permitted an A. F. of L. Union, known as Lime & Cement Employees Union of Contra Costa County, Local 21,074, hereinafter referred to as the A. F. of L. Union, whose members were actually doing the work in the cement plant, to intervene. A hearing was had and on November 28, 1939, the Court rendered its decision holding that in the interest of "fair play", the Board should have made the A. F. of L. Union a party to the complaint "and proceeded to a hearing which would have avoided all this delay and confusion." The Court remanded the proceeding to the Board. *National Labor Relations Board v. Cowell Portland Cement Company,* 108 Fed.(2d) 198, 206.

On February 16, 1940, the Board set aside its order of September 6, 1938 (R. 1) and on April 29, 1940, the Board made its order setting aside the record and referring the case to the Regional Director for a new hearing (R. 2-3). On May 8, 1940, the C.I.O. Union filed a new charge (R.

3-6) and on May 11, 1940, the Board issued a new complaint, based on said charge (R. 8-25). The complaint was served on petitioner and Local 86, another A. F. of L. Union. The case was tried on a new record and on April 18, 1942, the Board issued the decision and order which are the subject of this proceeding (R. 412-522).

On April 27, 1942, petitioner advised the Regional Director of the Board in writing that it considered the Board's decision and order to be unwarranted in law and in fact and that petitioner preferred to have the issues adjudicated by a court of law (R. 540-1). On February 23, 1943, the Board filed with the United States Circuit Court of Appeals, Ninth Circuit, its petition for the enforcement of said decision and order of April 18, 1942 (R. 524-35). On March 31, 1943, the petitioner filed its answer to said petition (R. 539-47) and on March 31, 1943, United Cement, Lime and Gypsum Workers International Union, Local No. 86, an A. F. of L. Union, filed its answer (R. 547-54). Following the filing of briefs and the holding of oral argument, the matter was submitted to the Court on February 9, 1944 (R. 3667).

On March 6, 1945, the Court filed its opinion. On the same day, the Court entered its decree enforcing the Board's order, as modified. Timely petitions for rehearing were filed by petitioner on March 26, 1945, by Local 86 on March 26, 1945, and by the Board on March 27, 1945 (R. 3701). On April 23, 1945, the Court made and filed its order denying each of said petitions for rehearing (R. 3701).

On April 25, 1945, the Court made its order staying the issuance of its mandate.

As will be specifically set forth in subsequent portions of this petition and in the accompanying brief, the matters here involved include what we believe to be important questions concerning

(a) the jurisdiction of the National Labor Relations Board;

(b) the validity of the Board's order as to back pay; and

(c) the validity of the Board's order as to reinstatement.

B.

JURISDICTION

1. The jurisdiction of the Supreme Court of the United States to issue the writ of certiorari herein prayed for is invoked under Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, 43 Stat. 936 (28 U.S.C., Section 347(a)).

2. The judgment which is sought to be reviewed was entered by the United States Circuit Court of Appeals, Ninth Circuit, on March 6, 1945 (R. 3668-3700). A petition by petitioner for a rehearing (filed within the time allowed by the rules of said Circuit Court of Appeals) was denied on April 23, 1945 (R. 3701).

C.

THE QUESTIONS PRESENTED

The following questions are presented:

1. In a case in which the Board's findings affirmatively declare that the employer is not engaged in com-

merce (as defined in the Act) and in which there is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else, does the Board have jurisdiction?

A subsidiary question under the head of jurisdiction is as follows:

> In the case of an administrative tribunal such as the National Labor Relations Board, is the tribunal's jurisdiction to be determined on the facts which exist at the time when the tribunal renders its decision or at the time when the complaint before the tribunal was filed?

2. May the Board, in a case of an unfair labor practice by the employer, award back pay to a striking employee for the time during which he is on strike, even though there has been no request for reinstatement?

> In other words, may a striking employee, at one and the same time, both strike and receive back pay for the period during which he is on strike?

3. May the Board award back pay for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge?

4. In a case in which the employee has secured other regular and substantially equivalent employment, may the Board direct reinstatement without making a finding of fact showing that the effectuation of the policies of the Act require such reinstatement?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioner respectfully submits the following reasons for the allowance of the writ:

1. The above questions are questions of importance in the administration of the National Labor Relations Act.

Among the most recent decisions of this Court in which certiorari was granted, on that ground, to review decisions of the National Labor Relations Board, we cite the following:

Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 644;

National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 115;

Medo Photo Supply Corp. v. National Labor Relations Board, 321 U.S. 678, 680;

National Labor Relations Board v. Indiana & Michigan Electric Co., 318 U.S. 9, 11;

National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., 315 U.S. 685, 690.

National Labor Relations Board v. Virginia Electric & Power Co., 314 U.S. 469, 476;

National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 430-1.

2. It is desirable, in order to facilitate the proper administration of the Act, to secure a decision by this Court on the following questions which have not heretofore been decided by this Court:

a. In a case in which the Board's findings affirmatively declare that the employer is not engaged in commerce (as defined in the Act) and in which there

is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else, does the Board have jurisdiction?

b. Is the jurisdiction of the Board, an administrative tribunal, to be determined on the facts which exist at the time when the Board renders its decision or at the time when the complaint before the Board was filed?

c. May the Board, in a case of an unfair labor practice by the employer, award back pay to a striking employee for the time during which he is on strike, even though there has been no request for reinstatement?

d. May the Board award back pay for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge?

3. The decision of the United States Circuit Court of Appeals that the Board's order as to reinstatement is not unlawful, notwithstanding the fact that it was made in the absence of adequate findings of fact showing that the effectuation of the policies of the Act requires that in this case the employer must offer reinstatement to former employees even though they have secured other regular and substantially equivalent employment, is in conflict with the decision of the Supreme Court of the United States in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 193, 196, 198, 200.

In that case, the Supreme Court held that said remedy does not automatically flow from the Act itself (p. 193) and that it is not mechanically compelled by the Act (p. 198) and that before the Board may make such an order, it must make adequate *findings of fact* that such an order

will effectuate the policies of the Act (p. 196). Because the Board did not make such findings, this Court directed the Circuit Court of Appeals to remand the case to the Board for determination of this issue (p. 200).

4. The decision of the United States Circuit Court of Appeals that in a case of an unfair labor practice by an employer the Board may award back pay to a striking employee for the time during which he is on strike, even though there has been no request for reinstatement, is contrary to the decisions of other circuit courts of appeals on the same matter, as shown in the following cases:

National Labor Relations Board v. American Manufacturing Co., 2 Cir., 106 Fed.(2d) 61, 68;

United Biscuit Co. v. National Labor Relations Board, 7 Cir., 128 Fed.(2d) 771, 778;

Polish National Alliance v. National Labor Relations Board, 7 Cir., 136 Fed.(2d) 175, 181.

In each of these cases, involving a strike following an unfair labor practice of an employer, the Court held that back pay should be awarded back only to the date of application for reinstatement. In other words, a striking employee cannot, at one and the same time, both strike and receive pay for the time during which he is on strike.

This Court's understanding of the proper rule would appear to be expressed in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 198, Footnote 7, as follows:

> "Even though a strike is caused by an unfair labor practice, the Board does not award back pay during the period of the strike. (*Matter of Sunshine Hosiery Mills*, 1 N.L.R.B. 664.)"

5. The decision of the United States Circuit Court of Appeals that back pay may be awarded for the period of time during which the employees unreasonably fail to file a proper charge (in this case, from July 17, 1937 to May 8, 1940) is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Mall Tool Co.*, 7 Cir., 119 Fed. (2d) 700.

In the latter case, the Court said (p. 702):

> "It is obvious that undue delay in filing charges may not only prejudice the employer but also tend to encourage employees to await in idleness with the expectation that no matter how long they delay filing charges, they will receive compensation for all time during which they have been quiescent. The legislation contemplates that a proceeding such as this shall promote the public welfare; not that it shall benefit private parties in respects unrelated to that welfare."

Accordingly, the Court modified the Board's order so as to require back pay back only to the date of the filing of the charges, which was September 23, 1938 (p. 702, 704).

6. The decision of the United States Circuit Court of Appeals that the jurisdiction of the National Labor Relations Board shall be determined on the facts which exist at the time the complaint is filed is contrary to the decisions of other circuit courts of appeals on the same matter, as shown in the following cases:

United Corporation v. Federal Trade Commission, 4th Cir., 110 Fed.(2d) 473;

Chamber of Commerce of Minneapolis v. Federal Trade Commission, 8th Cir., 13 Fed.(2d) 673.

In each of these cases, the Court held that where the administrative tribunal's power is regulatory or remedial and not punitive, and its orders operate in futuro, as is the case with the National Labor Relations Board, the issue of the tribunal's jurisdiction must be determined on the facts which exist at the time when the tribunal rendered its decision and not as of the earlier time when the tribunal filed its complaint.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein and that thereafter the judgment of the United States Circuit Court of Appeals be reversed by this Honorable Court and that your petitioner have such other and further relief as to this Honorable Court may seem meet and just.

Dated at San Francisco, California, this 11th day of July, 1945.

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Cowell Portland Cement Company.

In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief in Support of Petition for Writ of Certiorari

I.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals was rendered on March 6, 1945. The opinion is reported under the title of *National Labor Relations Board v. Cowell Porland Cement Co.* in 148 Fed.(2d) 237 and is set forth in full in the record (R. 3668-3700).

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

A full statement of these grounds has heretofore been given under headings B and D of the petition for the writ. In the interest of brevity, the statement will not be repeated in this brief.

III.

STATEMENT OF THE CASE

The Court is respectfully referred to the "Summary Statement of the Matter Involved" which appears under heading A of the petition for the writ.

The facts and the law on which we rely will be set forth under Points A, B, C and D of the Argument herein. A full statement of the case will appear in connection with each of said Points.

IV.

SPECIFICATION OF ERRORS

A. The United States Circuit Court of Appeals erred in holding that the Board had jurisdiction in a case in which the Board's findings affirmatively declared that the employer is not engaged *in commerce* (as defined in the Act) and in which there is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else.

In connection with the issue of jurisdiction, the Court also erred in holding that the jurisdiction of

the Board, an administrative tribunal, is to be determined on the facts which existed at the time it filed the complaint instead of at the time when it rendered its decision.

B. The United States Circuit Court of Appeals erred in holding that, in the case of an unfair labor practice by an employer, the Board may award back pay to a striking employee for the time during which he was on strike, even though there has been no request for reinstatement.

C. The United States Circuit Court of Appeals erred in holding that back pay may be awarded for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge.

D. The United States Circuit Court of Appeals erred in holding that, in a case in which the employee has secured other regular and substantially equivalent employment, the Board may direct reinstatement, without any finding of fact showing that the effectuation of the policies of the Act requires such reinstatement.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT

The argument will be presented under the four Points specified in Part IV of this brief, entitled "Specification of Errors".

Point A

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE BOARD HAD JURISDICTION IN A CASE IN WHICH THE BOARD'S FINDINGS AFFIRMATIVELY DECLARED THAT THE EMPLOYER IS NOT ENGAGED IN COMMERCE (AS DEFINED IN THE ACT) AND IN WHICH THERE IS NEITHER FINDING NOR EVIDENCE THAT THE EMPLOYER'S ACTS BURDEN OR OBSTRUCT THE COMMERCE OF ANYONE ELSE

1. The statutory provisions.

Section 2(6) of the National Labor Relations Act, 29 U.S.C.A., Sec. 152(6), provides:

> "The term 'commerce' means trade, traffic, commerce, transportation or communication among the several states, . . ."

In the interest of clarity and to avoid confusion with intrastate commerce, we shall, at times, refer to this commerce as interstate commerce.

Section 10(a) of the Act, 29 U.S.C.A., Sec. 160(a), provides, in part:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) *affecting commerce.*"*

Section 2(7) of the Act, 29 U.S.C.A., Sec. 152(7), reads:

> "The term 'affecting commerce' means *in* commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

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*Unless otherwise specified, all italics in this brief are ours.

There are thus two broad classes of cases in which the National Labor Relations Board has jurisdiction over an employer, namely

(a) Where the employer is engaged *in* interstate commerce; and

(b) Where the employer is not so engaged but his acts burden or obstruct the interstate commerce of *some one else's business.*

This situation appears very clearly from the concurring opinion of Justices Black, Douglas and Murphy in this Court's most recent decision on this subject. The case is *Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643, decided on June 5, 1944.

At page 651:

"The Board did not exercise jurisdiction and enter its order on a fact finding that petitioner's insurance activities merely affected commerce *in types of interstate business other than its own.* On this fact issue it made *no finding at all.* Its finding was that the petitioner, being 'engaged in the insurance business', was 'engaged *in* commerce within the meaning of the Act'. This ultimate finding of fact rested on detailed subordinate findings which revealed the widespread interstate activities of the petitioner in carrying on its insurance business."

Again, on page 653:

"The Board not having found as a fact that petitioner's life insurance business affected interstate activities *of other businesses,* the first issue is whether the Board's findings that petitioner's insurance activities were conducted across state lines are supported by evidence."

The Court unanimously found that petitioner's activities were so conducted.

In other words, if the Board finds, on substantial evidence, that the employer is, at the time, engaged *in* interstate commerce, there is no need to look further: but if the employer is not so engaged *in* interstate commerce, the Board's jurisdiction will not be upheld except on findings of fact, substantially supported, that the employer's activities burden or obstruct *some other business* which *is* engaged *in* interstate commerce.

With that distinction in mind, we next consider what findings of fact the Board actually made and what the Court held in the present case, on the commerce issue.

Before addressing ourselves to these matters, we wish to point out that the Circuit Court of Appeals was in error in stating that it had been our assumption that to be subject to the Board's jurisdiction an employer must be engaged *in* commerce. Both in our brief and in oral argument we considered also the second alternative but we insisted that there are in this case neither evidence nor findings of fact justifying assumption of jurisdiction by the Board under either the first or the second alternative.

2. Board's findings of fact on commerce issue.

On pages 491 to 499 of the Record, the Board addresses itself to findings of fact on the issue whether or not respondent is engaged *in* interstate commerce. We shall hereinafter consider these findings in detail.

For the present, we wish to draw the Court's attention to the fact that the Board there states that thus far it

has been considering only whether respondent's operations are "interstate in character"; i.e., whether respondent is engaged *in* interstate commerce.

In its concluding paragraph on the subject of jurisdiction (R. 499), the Board is still thinking in terms of engaging *in* interstate commerce.

Neither here nor anywhere else in the decision are there any findings of fact on whether or not petitioner's activities burden or obstruct the commerce of *any other business*, whether competitive or not. The simple fact is that the Board did not ground its jurisdiction on any such contention.

As this Court said in *Polish National Alliance v. National Labor Relations Board*, supra, p. 651:

> "The Board did not exercise jurisdiction and enter its order on a fact finding that petitioner's insurance activities merely affected commerce in types of interstate business other than its own. On this fact issue it made *no finding at all.*"

That is exactly our case. And the Board not having found as a fact that petitioner's activities affect the interstate activities of other business, the Board's jurisdiction can be upheld only on adequate findings, supported by substantial evidence, that at the time as of which that issue must be determined, petitioner was engaged *in* interstate commerce.

3. Action by the Court.

The Court, on the other hand, bases its decision on the assumption "that respondent (petitioner herein) was not engaged *in* commerce after March 1, 1940" (148 Fed.

(2d) 237, 241; R. 3677), the complaint having been filed on May 11, 1940. The Court holds (148 Fed.(2d) 237, 242; R. 3678) that the case falls within the second of the above two classes of cases, *as to which the Board made no findings of fact and as to which there was no evidence.*

In view of these conflicting positions taken by the Board and the Court, it becomes necessary to refer to the findings and the evidence bearing on each of the above two classes of cases.

4. Petitioner is not engaged in interstate commerce.

a. Raw materials.

The evidence shows, without dispute, that the raw materials out of which Cowell cement is made—limerock, sand, clay, gypsum—is all taken from California soil and that none of it ever crosses the California state line.

b. Cement.

The Board has found as a fact that the last shipment of cement to any point out of California was made on January 9, 1940, on a sale made in 1939. A strike on the San Francisco waterfront prevented the movement of the cement until January 9, 1940. After that date, not a pound of Cowell cement has been shipped to any place outside of California nor has any sale been made to any purchaser located outside the State. After that date, not a pound of Cowell cement has crossed the California state line (R. 493).

c. Power, fuel oil, repair parts and supplies.

The motive power used to drive the machinery in the cement mill at Cowell is electric energy generated and transmitted within California (R. 1927-8).

Fuel oil is used in the kilns in great volume. It is also produced in California oilfields and processed in an oil refinery at Martinez, California (R. 1928).

That leaves nothing except certain repair parts and certain supplies for the operation of the cement mill at Cowell. The great bulk of these items has always been produced in California and secured from points in California, principally the San Francisco Bay area (R. 1942-3).

These repair or replacement parts and supplies move to Cowell on the line of a short local railroad known as the B. P. & C. After referring to certain movements on this line in January and February, 1940, the Board expressly found (R. 494):

> "The records of the B. P. & C. disclose no interstate shipments thereafter . . ."

The record shows that on and after March 1, 1940, there has been no shipment of any repair or replacement parts or supplies from any point outside of California to Cowell and that after that date all such items have been produced in California or purchased from local California stocks (R. 494).

The Court refers (148 Fed.(2d) 237, 242; R. 3677) to items totaling $21,214.13 of materials, equipment and supplies which were shipped during January and February, 1940. This total consists of the following items:

> (a) Items totaling $4,836.00, which were produced or manufactured out of California but had become part of the local stocks of California dealers and were thereafter shipped from those stocks for delivery to Cowell.

The Board expressly found as a fact that these items were so shipped from California stocks (R. 494; see also Board's Exhibit 113b, R. 3515, 3517) and further found that subsequent to February, 1940, there have been *no interstate shipments to Cowell* (R. 494).

(b) Items totaling $16,378.00, consisting of 7 shipments purchased in 1939.

However, the Board's own exhibits and evidence showed, and the Board found, that the last of these items were delivered at Cowell in February, 1940, and that, beginning with March 1, 1940, there have been "no interstate shipments" (the Board's own words) to Cowell (R. 494).

The record thus shows, from the Board's own findings of fact, that, beginning with March 1, 1940, there have been no interstate shipments, either inbound or outbound, moving either to or from the cement mill at Cowell.

Since that time, petitioner has not engaged *in* commerce (Sec. 2(6) and (7) of the Act).

The complaint was filed on May 11, 1940, after petitioner's waning transactions *in* interstate commerce had completely ceased.

5. Petitioner's activities do not burden or obstruct the commerce of any third party.

As we have already pointed out, the Board made no finding of fact on this subject. It is obvious, from a study of the Board's decision, that it placed no reliance on any such situation. The Board relied exclusively on transactions *in* interstate commerce, which completely ceased some time before the complaint was filed.

We turn now to the Court. After assuming, as it was required to do, that petitioner has not engaged *in* commerce after March 1, 1940, the Court bases its conclusion on the issue of jurisdiction on the fact that certain items of materials and supplies which had been shipped into California and which had become part of the local stocks of California dealers, were thereafter shipped to Cowell in intrastate commerce (148 Fed.(2d) 237, 242; R. 3677-8). The Court's thought seems to be that as these items moved in interstate commerce when they originally entered California, a labor dispute at Cowell might burden or obstruct the commerce of the parties who originally shipped the items into California. The Board had no such thought and made no such finding.

Apart from the remoteness of any such effect, we invite the Court's attention to the following considerations:

(a) "The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. In applying this doctrine to particular situations this Court properly has been cautious, and *has required clear findings* before subjecting local business to paramount federal legislation."

Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 652;

City of Yonkers v. United States, 320 U.S. 685.

As already pointed out, the Board made no such finding of fact.

(b) "Whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

Florida v. United States, 282 U.S. 194, 209;
City of Yonkers v. United States, 320 U.S. 685, 690;
Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 652-3.

(c) The National Labor Act does not vest courts with power to supply findings which the Board did not make.

Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 651;
City of Yonkers v. United States, 320 U.S. 685, 690;
Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 94.

We also submit that *National Labor Relations Board v. Fainblatt,* 306 U.S. 601, on which the Circuit Court of Appeals relies (148 Fed.(2d) 237, 241; R. 3676), is not, except in its affirmance of the de minimis rule, in point here, because its facts are entirely different. The difference will appear clearly from the following two citations:

At page 603:

"Throughout the year there is normally a continuous day-by-day flow of shipments of raw materials to respondent's factory from points without the state, and of finished garments from respondent's plant to New York City and other points outside of New Jersey."

At page 605:

"Here interstate commerce was involved in the transportation of materials to be processed across

state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers."

As we have pointed out, there is in the present case no transportation of "materials to be processed" across state lines to Cowell and no transportation of any finished product to any point outside the State of California.

In the present case, the Board, in the last analysis, seems to base its claim to jurisdiction on the shipment of repair parts and supplies which moved to Cowell *in* interstate commerce in January and February, 1940, which movement permanently ceased before the complaint was filed.

Accordingly, we shall now address ourselves to one final question on this issue, namely,

"As of what date is the Board's jurisdiction to be determined?"

6. Date as of which Board's jurisdiction is to be determined.

We are here concerned with the power and authority of a regulatory *administrative tribunal*, not of a *court*.

We submit that the jurisdiction of the Board in this case must be determined by the facts existing *at the time the Board made its order.*

A well-reasoned case squarely in point is *United Corporation v. Federal Trade Commission*, 110 Fed.(2d) 473, decided by the United States Circuit Court of Appeals, Fourth Circuit, on March 11, 1940, opinion by Judge Parker.

The Federal Trade Commission had filed a complaint against United Corporation at a time when the Commission clearly had jurisdiction over the corporation.

Thereafter, however, the corporation, *by its own voluntary act* in acquiring capital stock of two other corporations, called Montell, Inc. and Emmart Food Products Co., changes its status so that it became a "packer" within the language of the Packers and Stockyards Act which gave the Secretary of Agriculture the power to regulate the business of "packers".

The relevant dates are as follows:

September 26, 1914—Federal Trade Commission Act approved (15 U.S.C.A., p. 327).

August 15, 1921 —Packers and Stockyards Act approved (7 U.S.C.A., p. 89).

March 31, 1937 —Federal Trade Commission files its complaint.

April 12, 1937 —United Corporation, by its voluntary act, acquires 20% of capital stock of Montell, Inc. and thereby becomes a "packer" under the Packers and Stockyards Act, subject to regulation by the Secretary of Agriculture.

May 1, 1937 —United Corporation, by its voluntary act, acquires 20% of capital stock of Emmart Food Products Co., with similar effect.

August 2, 1939 —Decision of Federal Trade Commission requiring United Corporation to cease and desist from specified practices.

The Federal Trade Commission having had jurisdiction at the time when the acts complained of were committed, the question at issue was whether or not it retained its jurisdiction so as to authorize it to make the order directed against the "packer". Circuit Judge Parker stated the position taken by the Federal Trade Commission, as follows (p. 474):

"The Commission, while virtually conceding that petitioner at the time of the entry of its order came within the definition of a packer as contained in the Packers and Stockyards Act, contends that it had jurisdiction *because petitioner had not acquired that status at the time of the filing of the petition before it.*"

The Court held that this position was not well taken. It decided, in view of the fact that the Commission's power is *regulatory* or *remedial* and *not punitive,* that the issue of the Board's jurisdiction must be determined on the facts which existed *at the time when the Board made its decision* and *not as of the time when the acts were committed or when the administrative tribunal filed its complaint.* On this subject, the Court said (p. 475):

"And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future. The Commission cites a number of cases holding that the jurisdiction of a court attaches upon the filing of the complaint and that subsequent changes cannot confer or divest jurisdiction; but these cases, we think, have no bearing upon the question here involved and furnish no analogy to be applied in the case of a regulatory commission whose orders operate in futuro."

Continuing, the Court said (p. 476):

> "An analogy is furnished, however, by the rule prevailing in equity to the effect that the court, in making its decree, is governed by the situation existing at the time the decree is entered, and not by that which existed at the inception of the litigation. 10 R.C.L. 559; 21 C.J. 664; *Stonega Coke & Coal Co. v. Price,* 4 Cir., 106 F.2d 411, 419; *Randel v. Brown,* 2 How. 406, 11 L.Ed. 318. And relief will not be afforded in equity when during the pendency of the suit, even on appeal, an event occurs making it impossible to grant effective relief. *Tennessee v. Condon,* 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 709; *Mills v. Green,* 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293."

In conclusion on this point, the Court said (p. 476):

> "When petitioner here, by acquiring stock in Montell, Inc., and Emmart Food Products Co., became a packer within the meaning of the Packers and Stockyards Act and subject to the jurisdiction of the Secretary of Agriculture, the Trade Commission had no further power of regulation over it; and the fact that the Commission may have been considering regulation under a complaint theretofore filed is immaterial."

The Court then referred to *Chamber of Commerce of Minneapolis v. Federal Trade Commission,* 13 Fed.(2d) 673, as "a case directly in point". Referring to that case, the Court said (p. 476):

> "A case directly in point is *Chamber of Commerce of Minneapolis v. Federal Trade Commission,* 8 Cir., 13 F.2d 673, 685. It appeared in that case that, while a proceeding against the Minneapolis Chamber of Commerce was pending before the Trade Commission,

Congress passed the Grain Futures Act, 7 U.S.C.A. §1 et seq., regulating a number of matters involved in the proceeding. In holding that as to these matters the Commission ceased to have jurisdiction, notwithstanding that the proceeding had been filed before the passage of the Grain Futures Act, the Court said: 'The above act was passed after this complaint was filed but before the order was made herein. *As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon.*' "

The Court then said (p. 476):

". . . *we are of opinion,* for the reasons stated, *that the jurisdiction of the Commission over petitioner must be judged as of the date of its order,* and that at that time it had no jurisdiction, since prior thereto petitioner had become a packer within the meaning of the Packers and Stockyards Act and its business had become subject to the exclusive regulation of the Secretary of Agriculture."

The Court concluded (p. 477):

"For the reasons stated, the order of the Federal Trade Commission will be set aside for lack of jurisdiction over the business of petitioner."

On the authority of the *Chamber of Commerce of Minneapolis* and the *United Corporation* cases and the cases cited by the Court in the decision in the *United Corporation* case, it is clear that the jurisdiction of the National Labor Relations Board must be decided on the facts as

they existed at the time the Board rendered its decision. In the absence of evidence to the contrary, it will, of course, be presumed that the facts on this issue shown to exist at the time of the trial continued to exist.

As petitioner had withdrawn from all interstate commerce, both outgoing and incoming, long before the Board made its decision, and as there is no finding of fact showing that petitioner's acts in any way burdened or obstructed the interstate commerce of anyone else, it is clear that the Board was without jurisdiction and that its decision is null and void.

The Circuit Court of Appeals referred to the above case as follows (148 Fed.(2d) 237, 241; R. 3677):

> "In support of its contention that the Board had no jurisdiction to issue the order on April 18, 1942, respondent cites *Chamber of Commerce v. Federal Trade Commission*, 8 Cir., 13 F.2d 673, and *United Corp. v. Federal Trade Commission*, 4 Cir., 110 F.2d 473. These cases did not arise under the National Labor Relations Act, but arose under the Federal Trade Commission Act, and hence are not in point."

As we read these two cases, they were decided on broad principles of administrative law and we find nothing therein indicating that it was intended to limit their effect to situations arising under the Federal Trade Commission Act.

However, if it be held that the determinative facts are those which existed at the time *when the Board filed its complaint*, namely, May 11, 1940, it appears, as we have shown, that the Board was likewise without jurisdiction to render the decision now before the Court.

We respectfully submit that the Board was without jurisdiction

(a) Because petitioner has at no time on or after March 1, 1940, been engaged *in* "commerce" (i.e., interstate commerce); and

(b) Because there was no evidence and no finding of fact by the Board that petitioner, not being so engaged, nevertheless by its acts burdens or obstructs the interstate commerce activities *of other businesses*, and the Act has not vested the Circuit Court of Appeals with power to supply findings of fact which the Board did not make.

Point B

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT, IN THE CASE OF AN UNFAIR LABOR PRACTICE, THE BOARD MAY AWARD BACK PAY TO A STRIKING EMPLOYEE FOR THE TIME DURING WHICH HE WAS ON STRIKE, EVEN THOUGH THERE HAS BEEN NO REQUEST FOR REINSTATEMENT

In this connection, the following facts are material:

1. The strike declared by the C.I.O. Union on July 17, 1937, has never been revoked and is still in effect.

The record so shows (R. 1020, 1042) and the fact is conceded.

2. The C.I.O. Union has never made request for reinstatement of its members.

This fact is likewise conceded. The Board made no finding of fact on the subject. The evidence required that if a finding had been made, it would have been to the effect that Local 356 has never made request for reinstatement of any of its members.

3. Every individual member of the C.I.O. Union who has ever made request for reinstatement has been reemployed.

> The record shows this fact without any contradiction (R. 2481, 2482, 2484-6).

On the basis of these facts, we rely on the well-established rule that, even though a strike is caused by unfair labor practice of the employer, back pay will not be awarded to a striker for the period of his strike up to the time when he requests reinstatement.

The underlying principle is that even though the strike has been caused by an unfair labor practice of the employer, such as the discriminatory discharge of employees, *a striking employee cannot, at one and the same time, both strike and receive back pay for the period of the strike.*

Excuses on his part for not having requested reinstatement do not change that fundamental situation.

Conceding the *facts* hereinbefore set forth, as the Court was bound by the record to do, the Court, nevertheless, ruled against petitioner's contention on this issue.

The Court said (148 Fed.(2d) 237, 245; R. 3686):

> "Respondent objects to paragraphs 2(a), 2(b) and 2(c). One objection is that some of the employees mentioned in these paragraphs participated in a strike called by Local 356 on July 17, 1937—after respondent had discriminatorily discharged them. This is not a valid objection."

We are not conscious of ever having made that objection. Our point has been and is that in the case of a strike, even though caused by an unfair labor practice of

the employer, *back pay* will not be awarded to a striker for the period of the strike and until he requests reinstatement.

The Court then said (148 Fed.(2d) 237, 245; R. 3686):

> "Another objection is that some of the employees mentioned in these paragraphs—employees whom respondent discriminatorily discharged—have not applied for reinstatement. This is not a valid objection."

In support of this statement, the Court cites, in a footnote—

> *National Labor Relations Board v. Sunshine Mining Co.*, 110 Fed.(2d) 780, 792; and
> *Idaho Potato Growers v. National Labor Relations Board*, 144 Fed.(2d) 295, 305.

We respectfully submit that these cases do not support the Court's conclusion.

Referring first to the *Sunshine Mining Co.* case, the portion of the decision on which the Court relies reads as follows (p. 792):

> "As the actual effect of respondent's conduct was to discharge those employees, the circumstances dispensed with the necessity of application for *reinstatement.*"

However, this language refers to a striker's "application for *reinstatement*", i.e., *to get his job back*, which is quite different from an award of *back pay*—a matter to which the cited passage makes no reference.

In the *Idaho Potato Growers* case, *there was no strike at all*, so that the case would not seem to have any application to our present problem.

In a number of other cases before the Board, *employees took the stand and testified* that they did not apply for reinstatement for the reason that they understood that their application would be granted only on condition that they submit to some unfair labor practice. *In the present case, not a single employee so testified.* The record does not contain the name of a single striker who, for that reason, failed to apply for reinstatement.

The Board, in other cases, has itself applied the principle on which we rely.

In the case of *In re Hemp & Company,* 9 N.L.R.B. 449, the Board said (p. 462):

> "We have refused to award back pay to employees who voluntarily go on strike, even if in protest against unfair labor practices. The reasons for that policy impel us to suspend the accrual of back pay in this case from the date of the hearing to the date of application for reinstatement as to all the union men except the three who rejected an offer to return to work prior to the hearing."

To the same effect, see also *In re Prettyman,* 12 N.L.R.B. 640, 672.

We now invite the Court's attention to decisions of Circuit Courts of Appeals approving and applying the rule.

In *National Labor Relations Board v. American Manufacturing Co.,* 2 Cir., 106 Fed.(2d) 61, decided on July 26, 1939, employees went on strike on or shortly after June 30, 1937, because of an unfair labor practice of the employer (p. 68). On July 27, 1937, these strikers requested reinstatement. The Board, following the usual rule, awarded back pay only to the day (July 27, 1937) on

which the strikers asked for reinstatement. The Court, in approving the order, said (p. 68):

> "Accordingly, the Board might in its discretion require these men to be reinstated with back pay *from July 27, 1937*, and its order is to that effect."

This decision was affirmed by this Court in a Memo Opinion (309 U.S. 629), with one modification not here relevant.

In *United Biscuit Co. v. National Labor Relations Board*, 7 Cir., 128 Fed.(2d) 771, decided on June 17, 1942, it appeared that production, maintenance and repair workers belonging to two unions referred to as Local 431 and Local 1053, went on strike on September 26, 1940, because of "petitioner's unfair labor practices" (pp. 773, 776). The Board, applying the usual rule, fixed October 23, 1940, as the date of application by the strikers for re-employment and awarded back pay to that date only (p. 776).

The Court, on a review of the evidence, found that application for reinstatement was not made until November 20, 1940 (p. 778). Hence, the Court, applying the rule for which we contend, said (p. 778):

> "Furthermore, the Board's order which requires back pay from October 23, 1940, for the production workers (members of Local 431) and the maintenance and repair workmen (members of Local 1053) must be modified so as to provide back pay only from November 20, 1940."

In *Polish National Alliance v. National Labor Relations Board*, 7 Cir., 136 Fed.(2d) 175, decided on June 5, 1943, it appeared that members of the Union "went on strike

on October 7, 1941, as a result of petitioner's (employer's) refusal to bargain with the Union and other unfair labor practices" (p. 181). The strike lasted until January 27, 1942, on which day application for reinstatement was made. The Board ordered back pay back only to January 27, 1942. The Court held this order to be "proper" and in this connection said (p. 181):

> "We think that the Board's order requiring that such employees be made whole *from the date of their application for reinstatement* is proper."

The Court then considered the case of an employee named Ziolkowski, who had applied for reinstatement as early as October 10, 1941. The employer offered to reinstate him, provided that he file "as a new applicant for work", an unlawful condition because he would then lose his seniority rights. Two out of three members of the Board awarded back pay only to January 27, 1942, but the Court found, as a fact, that the application for reinstatement was made as early as October 10, 1941. Applying the usual rule, the Court held that Ziolkowski was entitled to back pay back to October 10, 1941, being the date on which he made application for reinstatement (p. 181).

This decision, with modifications not material on this issue, was affirmed by this Court in *Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643, decided on June 5, 1944.

This Court's understanding of the rule appears in *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U.S. 177, 198, footnote 7, as follows:

> "Even though a strike is caused by an unfair labor practice the Board does not award back pay during

the period of the strike. (*Matter of Sunshine Hosiery Mills,* 1 N.L.R.B. 664."

As the strike declared by the C.I.O. Union on July 17, 1937, has never been revoked and is still in effect, and as the Union has never made request for reinstatement of its members, and as every individual member of the Union who has ever made request for reinstatement has been reemployed, we respectfully submit that the Board's back pay order should be denied enforcement.

Point C

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT BACK PAY MAY BE AWARDED FOR THE PERIOD OF TIME DURING WHICH THE EMPLOYEES UNREASONABLY DELAY THE FILING WITH THE BOARD OF A PROPER CHARGE

May 8, 1940, was the day on which the C.I.O. Union finally filed charges meeting the requirements of the Act. Prior to that time, the Union had filed charges and amended charges on which the Board had issued a complaint, but, as the Court pointed out in *National Labor Relations Board v. Cowell Portland Cement Company,* 108 Fed.(2d) 198, these documents and the complaint based thereon were fatally defective because they did not allege the existence of the A. F. of L. Union or its contract with petitioner herein.

It was not until May 8, 1940, that the C.I.O. Union finally filed charges containing the necessary allegations. As is well known, the Board's complaints are based on charges filed by complaining employees and until proper charges are filed a proper complaint does not issue.

The long delays prior to May 8, 1940, are the responsibility of the C.I.O. Union. For that reason, back pay should not, in any event, run back further than May 8, 1940.

In ruling on this issue, the Court said (148 Fed.(2d) 237, 246; R. 3690):

> "Respondent complains of delays in this proceeding and suggests that, if paragraph 2(b) is not set aside, we should, because of these delays, modify it 'so as to require back pay only for the period subsequent to May 8, 1940,' the date on which Local 356 filed its second amended charge. There have been delays, unfortunately, but we do not think they warrant the suggested modification."

As authority for this conclusion, the Court cites the following three cases:

National Labor Relations Board v. Electric Vacuum Cleaner Co., 315 U.S. 685, 698;

National Labor Relations Board v. Grower-Shipper Vegetable Association, 122 Fed.(2d) 368;

National Labor Relations Board v. J. G. Boswell Co., 136 Fed.(2d) 585.

In each of those cases, the Court declined to "visit the sins of the *Board* upon the employees", that is, declined to reduce the back pay which the employees would otherwise receive, because of the *Board's* delays. In none of those cases was there any showing of delay on the part of the *employees.*

The present case falls within the following principle recognized by this Court in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 199, footnote:

"If there is *unjustified delay in filing charges* before the Board, a deduction is made for the period of the delay."

We recommend to the Court's consideration the case of *National Labor Relations Board v. Mall Tool Co.*, 7th Cir., 119 Fed.(2d) 700. In that case, the employer urged that the Board's order as to back pay was unfair because it directed the employer to pay back wages back to March 15, 1937, the date of the lockout, whereas the charges were not filed until September 23, 1938, and the amended charge on April 28, 1939. Addressing itself to that contention, the Court said (p. 702):

"Respondent directs our attention to the fact that the Board itself has quite generally ruled that it will order back pay only from time of the filing of the charges, if there is unreasonable delay in filing charges and no mitigating circumstances are shown . . . We find in the record no mitigating circumstances justifying the delay."

Continuing, the Court said:

"It is obvious that undue delay in filing charges may not only prejudice the employer but also tend to encourage employees to await in idleness with the expectation that no matter how long they delay filing charges, they will receive compensation for all time during which they have been quiescent. The legislation contemplates that a proceeding such as this shall promote the public welfare; not that it shall benefit private parties in respects unrelated to that welfare."

Accordingly, the Court modified the Board's order so as to require back pay back only to the filing of the charges on September 23, 1938 (pp. 702, 704).

In the present case, the employees procrastinated for several years before filing proper charges. It seems to us that it would be clearly unjust to require the employer to pay back wages for this period and that to require him to do so would be giving to the Act a punitive rather than a regulatory effect.

We submit that if back pay is to be awarded at all, it should not be for any period of time prior to May 8, 1940.

Point D

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT, IN A CASE IN WHICH THE EMPLOYEE HAS SECURED OTHER REGULAR AND SUBSTANTIALLY EQUIVALENT EMPLOYMENT, THE BOARD MAY DIRECT REINSTATEMENT, WITHOUT ANY FINDING OF FACT SHOWING THAT THE EFFECTUATION OF THE POLICIES OF THE ACT REQUIRE SUCH REINSTATEMENT

Referring to this matter, the Court merely said (148 Fed.(2d) 237, 246; R. 3689):

> "The Board states its *conclusion* that the affirmative action required by the order—including that required by paragraphs 2(a), 2(b) and 2(c)—would effectuate the policies of the Act, and it found facts which, in our opinion, warrant the conclusion."

The Court did not state what those facts were, nor did it refer to any part of the Record or to any decision in support of its conclusion.

Turning to the Board's decision (R. 507), we find that the only support given by the Board to its above conclusion is a footnote (No. 79) referring to *Matter of Ford Company,* 31 N.L.R.B. No.170, and *National Labor Relations Board v. Continental Oil Company,* 121 Fed.(2d) 120.

The latter case does not even refer to the point here at issue. As to the *Ford* case, the *facts* in that case are, of course, not the *facts* in the present case, and *findings of fact* in the *Ford* case cannot be used as a substitute for the necessary *findings of fact* in the present case. Findings of fact cannot be tossed around from case to case in any such way.

It is the duty of the Board to make adequate findings of fact in order to give proper support to a conclusion that the policies of the Act require that, in a given case, the employer should offer *reinstatement* to his former employees who have secured other regular and substantially equivalent employment.

In *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U.S. 177, this Court held that this remedy does not automatically flow from the Act itself (p. 193) and that it is not mechanically compelled by the Act (p. 198). Before the Board may make such an order, it must make adequate *findings of fact* that such order will effectuate the policies of the Act (p. 196): and because the Board had not made such findings, this Court directed the Circuit Court of Appeals to remand the case to the Board for determination of this issue (p. 200).

The Board had found that "the effectuation of the policies of the Act patently requires" the restoration of the strikers to their status quo, and also that the employer should take affirmative action "designed to effectuate the policies of the Act" (p. 203) and had ordered the respondent to take affirmative action (including reinstatement) "which the Board finds will effectuate the policies of the act" (p. 204).

However, the Court, in the majority decision, held that these findings (or conclusions) were not sufficient and ordered the case remanded.

In the present case, the Board stated that it would require reinstatement and that the same would "effectuate the policies of the Act" (R. 507) and ordered the employer to take affirmative action (including reinstatement) "which the Board finds will effectuate the policies of the Act" (R. 517).

We invite the Court's especial attention to the fact that *the Board in the present case used exactly the same language—and no more—which this Court in the Phelps Dodge Corporation case found to be inadequate and insufficient.*

Furthermore, the Board in the present case made its conclusion *without any evidence* on the subject, all such evidence having been expressly deferred by reason of a stipulation (R. 1891-2).

We respectfully submit, in reliance on the decision of this Court in the *Phelps Dodge Corporation* case, supra, and on the state of the present record, that the Board's order as to reinstatement should be denied enforcement as to all former employees who have secured other regular and substantially equivalent employment.

It is respectfully submitted that the writ should issue.

Dated: San Francisco, California, July 11th, 1945.

MAX THELEN,
GORDON JOHNSON,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 231

COWELL PORTLAND CEMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 3668–3691) was issued on March 6, 1945, and is reported in 148 F. 2d 237. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 412–522) are reported in 40 N. L. R. B. 652.

JURISDICTION

The decree of the court below was entered on March 6, 1945 (R. 3692–3700). Petitions for rehearing filed by the petitioner, by Local 86,[1] and

[1] United Lime & Gypsum Workers' International Union, Local 86, affiliated with the A. F. of L. (*infra*, pp. 3–4, fn. 3).

by the Board, were denied on April 23, 1945 (R. 3701). The petition for a writ of certiorari was filed on July 14, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, when employees strike as a result of being discriminatorily locked out by the employer, and the employer conditions their reinstatement upon their acceptance of membership in a labor organization which is not of their choice, the Board may properly award the employees back pay for a period during which they were on strike and had not applied for reinstatement.

2. Whether the Board, having decided as a matter of policy that the fact that employees may have obtained substantially equivalent employment subsequent to the discrimination against them is irrelevant to the determination of the question whether reinstatement of such employees effectuates the policies of the Act, is required, in each case in which the issue is raised, to restate its reasons for concluding that the reinstatement of such employees will effectuate the policies of the Act.

Two further questions are urged by petitioner (Pet. 4–5) but we believe that they are not presented on the facts of this case. The questions are:

3. Whether petitioner, by discontinuing all transactions in interstate commerce subsequent to a remand by the court below of an earlier Board order and prior to issuance of the Board's final order, ousted the Board from jurisdiction to issue its order.

4. Whether the Board is precluded from awarding back pay for a period during which the employees discriminated against unreasonably delayed the filing of a proper charge with the Board.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix (*infra*, pp. 23–26).

STATEMENT

The original charges in this proceeding were filed by Local 356 [2] on July 17, 1937 (R. 510–511). Upon these charges and supplemental charges the Board issued its complaint against petitioner on August 20, 1937 (R. 511). Following a hearing the Board, on September 6, 1938, issued its decision in which it found that petitioner had violated the Act by conduct which included locking out employees because of their affiliation with Local 356, refusing to bargain with Local 356, and entering into a closed-shop contract with an A. F. of L. union [3] which petitioner had assisted

[2] International Union of Mine, Mill & Smelter Workers of America, Local 356, affiliated with the C. I. O.

[3] Lime & Cement Employees Union of Contra Costa County, No. 21074, affiliated with the A. F. of L. and herein

by its unfair labor practices and which did not represent a majority of petitioner's employees. The Board found that petitioner had thereby engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act and ordered petitioner, *inter alia,* to cease and desist from its unfair labor practices and to cease giving effect to the closed-shop contract. *Matter of Cowell Portland Cement Company,* 8 N. L. R. B. 1020, 1038–1040. Upon the Board's petition for enforcement of its order, the Circuit Court of Appeals for the Ninth Circuit sustained the Board on the question of the Board's jurisdiction over petitioner, but because the A. F. of L. union had not been made a party to the Board proceeding, the court stated that the Board should have "set [its order] aside, amended its complaint, served it on the A. F. of L. Union, and proceeded to a hearing * * *" *National Labor Relations Board* v. *Cowell Portland Cement Company,* 108 F. 2d 198, 201–202, 206. The court thereupon remanded the case to the Board "for such action as [the Board might] deem proper" (*id.*). Accordingly, the Board set aside its decision and order of September 6, 1938, and the record previously made, amended its complaint so as to

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called Local 21074 and, at times, the A. F. of L. union. In October 1939, Local 21074 was succeeded by United Lime & Gypsum Workers' International Union, Local 86 (R. 488–490; 1892–1894, 1896–1897, 2416–2430, 2978), a party before the Board and the court below in the instant proceeding (*supra,* p. 1).

put in issue the legality of the closed-shop contract, impleaded the A. F. of L. union and its successor, Local 86, and ordered a new hearing to be held (R. 1–3, 8–25). Thereafter, upon the usual proceedings pursuant to Section 10 of the Act, the Board found that petitioner had engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act, and issued its findings of fact, conclusions of law, and order, which are the subject of the instant proceeding (R. 412–522). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:

Petitioner's employees began to organize Local 356 in May 1937 (R. 427; 664). On May 27, 1937, the day Local 356 was chartered by the C. I. O., W. H. George, petitioner's general manager, reproached Mogus, secretary of Local 356, for being "mixed up" with the C. I. O., which George said was "run by a bunch of Reds and Communists," and stated that he would close the plant rather that deal with *any* labor organization (R. 427–428; 668–671, 708–709, 1047). Similar statements were made to Mogus by his immediate superior, (R. 428; 671–672, 1047–1048). George subsequently warned other employees that the plant would be shut down if the employees affiliated with the C. I. O. (R. 428; 1280–1281). George testified, however, that before the end of June 1937, he had made up his mind that if petitioner's

employees insisted upon organizing a union "it ought to be a federal charter under the California Federation and the American Federation [of Labor]" (R. 427; 1214–1218).

Petitioner's principal owners, the Cowells (R. 569–570, 596–602), were at first willing to bargain with Local 356 (*infra*, p. 7), which by the end of June 1937, represented a majority of petitioner's employees, and had requested petitioner to bargain with it (R. 430; 852–854, 1087–1095, 2207–2212). To forestall such action, which George believed would amount to a "sinister conspiracy" against petitioner's best interests (R. 431; 1225–2226, 1234, 1289, 1301–1302), George, about the middle of June, and repeatedly thereafter, urgently requested the American Federation of Labor to issue a charter for an industrial or plant-wide, union at petitioner's plant (R. 429, 433, 455–456; 1228–1236, 1297). Prior to the lockout (*infra*, pp. 8–9) George's efforts to establish an A. F. of L. union in petitioner's plant, in addition to the foregoing, consisted of his personal solicitation among the employees of a sufficient number of charter members for the proposed organization to satisfy the requirements of the A. F. of L. for the issuance of a charter (R. 433; 1237–1241, 1262–1263, 1267–1268, 1322–1323; 1484–1485, 2275, 2700–2703), and the payment to the A. F. of L. of the initial dues of the proposed local, which he charged to petitioner (R. 433–434; 3359, 3436–3443).

Meanwhile, Local 356 had submitted a proposed contract to petitioner and, in accordance with instructions from the Cowells, petitioner was negotiating with Local 356 through Plant Superintendent Barnett and Gordon Johnson, one of petitioner's attorneys (R. 430; 674–675, 852–854, 888–891, 1087–1095, 2207–2212, 2230, 2243, 2267). Barnett warned the union representatives at the outset that "if Mr. George ever got into the picture the thing might go up in smoke" (R. 430; 674–675). Petitioner was to submit certain counterproposals to the union representative not later than the afternoon of July 16 (R. 434; 681–686, 989–990, 2267–2272, 2606–2607). Petitioner did not fulfill this promise to deliver a counterproposal to Local 356.[4] Instead, on the appointed afternoon, Superintendent Barnett summoned Mogus and told him that the counterproposal would not be forthcoming because "Hell had broken loose in San Francisco[5] * * *" (R. 437; 688–689, 994–995, 3058–3059). Three days later petitioner formally transferred Barnett's authority in labor matters to its attorneys, Thelen and Johnson (R.

[4] On July 15, while soliciting Sayers, an employee, to join the A. F. of L., George maligned the C. I. O. as a "Communistic organization" (R. 435; 2702–2703, 2711–2712), and when Sayers asked why petitioner was negotiating with such an organization George replied "Well, that is a hard question to answer. A great mistake has been made. However, that has all been fixed up now" (id.).

[5] Petitioner's executives, including George, had their offices in San Francisco (R. 421).

438; 2344–2346). Petitioner never resumed bargaining negotiations with Local 356 (R. 483–484; 694). The Board found that petitioner's conduct on and after July 16, 1937, constituted a refusal to bargain with Local 356 in violation of Section 8 (5) of the Act (R. 483–486, 513–514).

About 3:30 p. m., on July 16, shortly after Superintendent Barnett had learned of petitioner's decision not to deliver the counterproposal to Local 356, George ordered Barnett, by telephone, "to shut the plant down, except the pumps" (R. 436; 2614, 1277–1279, 2332, 2646–2649). Barnett thereupon halted operations in practically every department that afternoon and laid off all but a few employees (R. 437; 1339–1368, 1427–1429, 2332–2335, 2944–2963). No explanation for the closing was given to the men or to their supervisors (R. 693, 1717, 1736, 2700, 2717–2719, 2870–2871). The Board found that, statistically, the shut-down was not required either by petitioner's sales records (R. 453; 2811, 2861), or by the state of its supplies of finished cement (R. 453; 2306–2312, 2319, 2814–2818, 2825–2829), or of its supplies of raw materials (R. 453–454; 2810, 2860, 2875–2878, 2891–2893, 2863–2864).

On the next day, July 17, the members of Local 356, provoked by petitioner's failure to submit the counterproposal and believing that the shut-down was a deliberate maneuver to force the employees to abandon the C. I. O., held a meeting and voted to strike (R. 438, 488; 705–708, 1019-

1020, 1146–1147, 3247–3250). The strike began on July 18, with the picketing of petitioner's plant (R. 1058, 2345). The Board found that the shut-down was, in fact, a lock-out designed to force petitioner's employees to abandon the C. I. O. and to adopt the A. F. of L. as their bargaining representative and that it constituted a discriminatory discharge of the employees involved, in violation of Section 8 (3) of the Act (R. 459–460, 514).

While the lock-out progressed George succeeded in having the A. F. of L. issue a charter for a local (No. 21074) at petitioner's plant (R. 441; 1236), and informed the employees individually (R. 439, 441–442; 1481, 1718–1719, 2703–2705) and collectively (R. 444–445; 1496–1504, 1615–1617) that they would have to join the A. F. of L. to obtain further employment with petitioner.[6] Petitioner's attorney, Thelen, likewise informed representatives of Local 356 that petitioner would not resume operations with a working force affiliated with the C. I. O., saying that if it did, the A. F. of L. would boycott its product (R. 1146, 1197–1200). At the same time Thelen offered to reopen the plant and put the men back to work if they became members of the A. F. of L. (*id.*). After the A. F. of L. charter was issued George assisted the new local by furnishing it with an

[6] Two of petitioner's foremen exerted similar pressure upon employees on behalf of the A. F. of L. (R. 439–440; 1481–1484, 1606–1608, 1752–1760).

office in the plant, which it occupied rent-free from August until December 1937 (R. 441; 1491–1496, 1571–1572, 1584).[7] On August 27, petitioner and Local 21074 executed a closed-shop contract, prepared by petitioner's attorneys (R. 445–446; 1253–1262, 1511–1512, 1623–1624, 3202), although the local claimed only 27 members (R. 446–447; 224, 1532–1550, 3605–3608) in a bargaining unit of 196 employees. On September 7, petitioner formally notified a committee of its striking employees, who in turn informed the membership of Local 356, that it would require membership in Local 21074 as a condition of reinstatement (R. 448; 699–701, 1033, 1038, 3466–3468). On October 1, 1937, petitioner reopened all departments of its plant (R. 1285), but took back only those employees who joined Local 21074 (R. 520–522, 1897, 2435, 2978, 3398–3420).

The Board's order requires petitioner to cease and desist from unfair labor practices, to cease giving effect to its closed-shop contracts with the A. F. of L. unions, to withdraw recognition from them as the exclusive representatives of its employees until they are certified by the Board as such representatives, to offer reinstatement with back pay from July 16, 1937, the date of the lock-out, to the employees discriminated

[7] Petitioner also rendered other assistance to the A. F. of L. local (R. 443–444, 448; 1463–1474, 1487–1491, 1523, 1570, 1656–1689, 1700–1714).

against (with 4 exceptions not material here[8]), and to post appropriate notices (R. 515–522).

The Board filed in the court below a petition for enforcement of its order (R. 524–535), and on March 6, 1945, the court handed down its opinion and entered its decree enforcing the order (R. 3668–3700) with modifications not here material.[9]

ARGUMENT

1. The first question stated in the petition (Pet. 4–5, Br. 16–20) is whether the Board may properly issue an order against an employer who, at the time he committed unfair labor practices, was engaged in commerce within the meaning of the Act (Sec. 2 (6)), but who, at the time the Board issued its decision and order, was not engaged in such commerce. We submit that the instant case, upon the facts as found by the

[8] See R. 461–463, 504–505, 517–518.

[9] In its decree the court struck from the Board's order paragraph 1 (f) which required petitioner to cease and desist from "In any other manner interfering with, restraining, or coercing its employees" in the exercise of their rights as guaranteed in Section 7 of the Act (R. 516, 3684, 3691, 3692–3693) and modified paragraph 2 (b) of the Board's order by adding a proviso thereto defining the terms "loss" and "net earnings" (R. 517, 3691, 3692, 3695). While we think these modifications unjustified, for the reasons set forth in the Board's petition for certiorari in *National Labor Relations Board* v. *Chenery California Lumber Co.*, No. 319, filed August 13, 1945, the desirability of avoiding further delay in securing enforcement of the remainder of the Board's order in this case has led us not to file a cross-petition.

Board and sustained by the court below, does not present this question.

Petitioner does not question the validity of the Board's finding, sustained by the court below in its earlier decision (108 F. 2d 198, 201–202), that petitioner was engaged in commerce, within the meaning of the Act, at the time the unfair labor practices were committed (Br. 30).[10] The Board found that petitioner, subsequent to the remand of this case to the Board in November 1939 (*supra*, p. 4), attempted to discontinue all transactions in interstate commerce, in order to avoid the consequences of its prior violation of the Act (R. 491–499; 1928–1930, 2049–2059, 2093–2095, 2097–2098, 2110–2111, 2125–2127, 3569, 3573–3574, 3576–3583, 3595, 3599–3600). The Board found, however, contrary to petitioner's assertions, that at the time of the hearing before

[10] Petitioner, a large manufacturer of Portland cement operating a plant at Cowell, California, is one of three affiliated, and commonly owned and managed, companies which together constitute a single integrated enterprise engaged in the production, sale, and distribution of cement and building materials. For several years prior to the hearing in 1940 petitioner shipped in interstate commerce large quantities of cement and of materials and supplies necessary to its operations. The Board's detailed findings with respect to the above facts appear at R. 420–424 and the supporting evidence at R. 9, 43, 286–287, 569–578, 586–602, 607–614, 655–662, 1299–1300, 1410–1411, 1824, 1828–1830, 1847, 1849, 1854, 1946–1961, 1980–1997, 2025–2026, 2065–2069, 2088–2091, 2097, 2099–2101, 2115, 2118–2124, 2143, 2147, 2152, 2168–2198, 3097–3098, 3332–3371, 3545–3546, 3549–3551, 3558, 3560–3562, 3566–3568.

the Trial Examiner, in June 1940, petitioner was still engaging in substantial transactions affecting interstate commerce.[11] Thus, during the first six months of 1940, while petitioner made no sales in interstate commerce, it received materials and supplies worth $75,967, of which 28 percent, valued at $21,214,[12] originated outside the State (R. 496), and of which a substantial part was shipped directly to petitioner from outside the State. On these facts the Board concluded that petitioner's operations "still have a close, intimate, and substantial relation to" interstate commerce (R. 497). Sustaining the Board's findings of fact and its jurisdictional conclusions, the court below stated (R. 3677–3678) that the "Transportation of such materials, equipment and supplies into California from points outside the State was commerce [Sec. 2 (6) of the Act]. The Board found, and the finding is supported

[11] The court below, referring to petitioner's shipments of materials and supplies up to June 20, 1940, the time of the hearing stated: "There being * * * no claim or suggestion that shipments and deliveries ceased on that date, we may and do assume that they continued" (R. 3677–3678).

[12] Of this amount, $16,378 represents materials and supplies ordered by petitioner in 1939 and shipped direct to petitioner in 1940 from outside of California (R. 496; 3519–3520); $3,885 represents materials and supplies manufactured outside the State and filled from stock maintained by sellers within the State (R. 3513–3515); and $951 represents materials and supplies manufactured outside the State and shipped to the seller in California to fill petitioner's order, and then reshipped to petitioner (R. 3517–3519).

by substantial evidence, that * * * [petitioner's] unfair labor practices tended to lead to labor disputes burdening and obstructing that commerce and the free flow thereof and therefore were unfair labor practices affecting commerce [Sec. 2 (7) of the Act]".

There is no basis for petitioner's suggestion that the holding of the court below that its practices at the time of the hearing affected commerce departed from the theory adopted by the Board. The Board did not merely find, as petitioner claims, that petitioner was engaged in interstate commerce, as it was,[13] but also that its activities burdened commerce (R. 497). The Board and the court were thus entirely consistent. The Board also found (R. 498–500), we believe correctly, that even if petitioner had abandoned its interstate sales and purchases after the commission of the unfair labor practices, the Board would not be ousted of jurisdiction to issue a remedial order. But the court below did not and this Court need not pass upon that issue. Inasmuch as the court below did not decide whether the Board's jurisdiction was to be determined as of the time of the issuance of the complaint or as of the time of the Board's decision, the issue petitioner seeks to raise is not presented and the decision below in no sense conflicts with *United Corporation* v. *Federal Trade Commission,* 110 F. 2d 473, 476 (C. C. A. 4) and *Chamber of Com-*

[13] *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

merce of Minneapolis v. *Federal Trade Commission*, 13 F. 2d 673, 685 (C. C. A. 8).

2. Petitioner's major contention with respect to the Board's back pay order (Br. 29–35) is that the Board may not properly award back pay to striking employees who have not applied for reinstatement. But here not only was the strike caused by the employer's unfair labor practices; the employer had informed the strikers that they would be reinstated only if they accepted the illegal requirement that they abandon the C. I. O. and became members of the A. F. of L.[14]

It is true that the general rule, exemplified by the cases cited by petitioner (Br. 32–34), is that the Board, as a matter of policy, will not award back pay to employees for a period during which they are striking, even when they are striking as a result of the employer's unfair labor practices, and that the strikers must demonstrate their willingness to return to work by applying for reinstatement.[15] Ordinarily, in such cases, the Board will award back pay only from the time the strikers, upon such application for reinstatement,

[14] Petitioner, by statements to the employees and by its execution of the illegal closed-shop contract with the A. F. of L. union, made it clear to the strikers that they could obtain reinstatement only if they abandoned the C. I. O. and became members of the A. F. of L. union (*supra*, pp. 9–10).

[15] *Matter of Long Lake Lumber Company*, 34 N. L. R. B. 700, 718; National Labor Relations Board, *Third Annual Report* (1938), p. 210; *Fourth Annual Report* (1939), p. 102; cf. *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 198.

are either refused reinstatement altogether or are offered reinstatement subject to the imposition of further illegal restraints upon their rights under the Act.[16] However, where, as in the instant case, the employer openly and in advance conditions the acceptance of a striker's application for reinstatement upon the striker's acceptance of unlawful restraints upon his statutory rights, the Board need not require the striker to make the useless gesture of an application for reinstatement but may treat him as an employee discriminatorily discharged and, as such, entitled to back pay from the time of the discrimination against him. *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board,* 119 F. 2d 903, 914–915 (C. C. A. 8); *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. 2d 780, 792 (C. C. A. 9), certiorari denied, 312 U. S. 678;[17] *National Labor Relations Board* v. *Carlisle*

[16] *National Labor Relations Board* v. *American Mfg. Co.,* 106 F. 2d 61, 68 (C. C. A. 2), affirmed as modified, 309 U. S. 629; *National Labor Relations Board* v. *Poultrymen's Service Corporation,* 138 F. 2d 204, 210 (C. C. A. 3); *Birmingham Post Company* v. *National Labor Relations Board,* 140 F. 2d 638, 639 (C. C. A. 5), enforcing 49 N. L. R. B. 206, 210; *Polish National Alliance* v. *National Labor Relations Board,* 136 F. 2d 175, 181 (C. C. A. 7), affirmed, 322 U. S. 643; *National Labor Relations Board* v. *Lettie Lee, Inc.,* 140 F. 2d 243, 244 (C. C. A. 9), enforcing 45 N. L. R. B. 448, 460–463; see National Labor Relations Board, *Fourth Annual Report* (1939), p. 105.

[17] Contrary to petitioner's contention (Br. 31), the *Sunshine Mining* case, *supra,* is not distinguishable from the instant case with respect to the point under discussion. In

Lumber Co., 94 F. 2d 138, 142–143 (C. C. A. 9), certiorari denied, 304 U. S. 575, and 99 F. 2d 533, 535–536, 539, certiorari denied, 306 U. S. 646; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 888 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *A. Sartorius & Co.*, 140 F. 2d 203, 205, 207 (C. C. A. 2). Cf. *Idaho Potato Growers, Inc.* v. *National Labor Relations Board*, 144 F. 2d 295, 304–305 (C. C. A. 9), certiorari denied, 323 U. S. 769; *Subin* v. *National Labor Relations Board*, 112 F. 2d 326, 331 (C. C. A. 3), certiorari denied, 311 U. S. 673.

Moreover, where, as here (*supra*, p. 9), employees are locked-out by the employer, the Board may award back pay to the employees for the period of the lock-out even though the employees subsequently strike during that period. Precisely in point is *National Labor Relations Board* v. *Long Lake Lumber Company*, 138 F. 2d 363, 364-365 (C. C. A. 9), enforcing 34 N. L. R. B. 700, 721–723. In its decision in that case the Board stated:

> When employees voluntarily go on strike even in protest against unfair labor practices, it has been our policy not to award them back pay during the period of the strike. In the instant case, however, the

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both cases the court enforced the Board's orders awarding back pay to strikers despite the fact that the strikers had not applied for reinstatement.

> commencement of the strike on June 7, because of the lock-out of the employees, did not terminate the respondents' obligation to make payments of back pay to the locked out employees since on that date the lock-out was in existence and the strike had no effect on the situation (34 N. L. R. B. at 718).

See also National Labor Relations Board, *Fourth Annual Report* (1939), p. 102; *Sixth Annual Report* (1941), p. 75. Petitioner's termination of the lock-out by the resumption of operations in October 1937, of course, did not suspend the accrual of back pay, since the unlawful conditions which petitioner had attached to the reinstatement of the lock-out employees were never removed (*supra*, p. 10).

The decisions in *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. 2d 61, 68 (C. C. A. 2), affirmed as modified, 309 U. S. 629; *United Biscuit Co.* v. *National Labor Relations Board*, 128 F. 2d 771, 778 (C. C. A. 7); and *Polish National Alliance* v. *National Labor Relations Board*, 136 F. 2d 175, 181 (C. C. A. 7), affirmed, 322 U. S. 643, are not in conflict with the decision of the court below, as petitioner alleges (Pet. 8, Br. 32–34). The cited decisions stand only for the general rule that a striker's application for reinstatement may properly initiate the running of back pay. They did not hold that such an application is essential upon facts such as are presented in this case.

3. Petitioner's further contention (Pet. 9, Br. 35–38) that the scope of the Board's back pay order should be reduced because the complaining employees "unreasonably" failed to file a "proper charge" during the period from July 17, 1937 to May 8, 1940, is frivolous.

The employees first filed a charge on July 17, 1937, (Bd. Ex. 1-a), the day after petitioner locked them out, and the Board's original complaint was issued on August 20 (Bd. Ex. 1-c). The failure of the charge to mention the A. F. of L. contract executed some time later and of the Board to make the A. F. of L. a party to its subsequent proceeding did not reduce the effect of the charge as a notice to petitioner that the employees were contending that the lock-out was unlawful.

This is plainly not a case in which delay in filing charges lulled the employer into failure to reinstate or otherwise prejudiced him, as was *National Labor Relations Board* v. *Mall Tool Co.*, 119 F. 2d 700, 702, 704 (C. C. A. 7), cited by petitioner. Unquestionably, petitioner was aware from the time that the original charge was filed on July 17, 1937, that the employees were insisting that the lock-out on the previous day was illegal, and that if the charges were sustained, back pay might accrue from that time. As the Board declared (R. 511), petitioner "has at all times since the service of the original complaint been on notice of the precise claims made on behalf

of the Government." In so far as any delay was caused by the remand of the case and the filing of an amended charge, it was not attributable to the complaining employees or to Local 356,[18] but to the Board's failure in the initial hearing to put in issue the question of the validity of petitioner's closed-shop contract with the A. F. of L. union (*supra*, p. 4). It is settled, as petitioner apparently concedes (Br. 36–37), that delays caused by the Board would not warrant withholding from the employees back pay to which they would otherwise be entitled. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 697–698; *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 597 (C. C. A. 9). Cf. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 583.

4. In *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, the Court held that the Board could not require reinstatement for employees who might have obtained substantially equivalent employment elsewhere unless it indicated "that it has exercised the discretion with which Congress has empowered it" to develop particular remedies, and shown why it believed the remedy selected necessary to the effectuation of the policy of the statute. In the

[18] The final order of the Circuit Court of Appeals setting aside the Board's original decision was entered on December 30, 1939 (108 F. 2d 198), and the amended charge filed May 8, 1940. Petitioner is not contending that this four-month period was unduly long.

Board's subsequent decision in *Matter of Ford Motor Company,* 31 N. L. R. B. 994, 1099–1100, the Board fully set forth its reasons for concluding as a matter of general policy that "the mere obtainment of substantially equivalent employment, and evidence pertaining thereto, is irrelevant to considerations decisive of the question whether reinstatement effectuates the policies of the Act." In the *Ford* case the Board explicitly stated that these "decisive considerations do not vary from case to case". In the instant case the Board did not restate the considerations set forth in the *Ford* opinion, but merely cited that case in support of the statement that the portion of the order in question "is necessary to assure effectively the right of self-organization to the respondent's employees and thus effectuate the policies of the Act" (R. 507).

Petitioner's contention is that the Board is required to restate fully the reasoning behind its determination in every case, and that it was not sufficient merely to refer to the *Ford* case for the reasons underlying the Board's conclusion. A similar argument was rejected by this Court in *Republic Aviation Corp* v. *National Labor Relations Board,* No. 226, 1944 Term, decided April 23, 1945. The same conclusion has been reached by five circuit courts of appeals.[19] Obviously the

[19] *National Labor Relations Board* v. *Brezner Tanning Co.,* 141 F. 2d 62, 65 (C. C. A. 1); *National Labor Relations Board* v. *Regal Knitwear Co.,* 140 F. 2d 746, 747 (C. C. A. 2), af-

Phelps Dodge decision was not designed to impose upon the Board an inflexible requirement that policy considerations which do not vary with the facts of particular cases must be repeatedly restated at length.

CONCLUSION

Upon the issues raised by the petition the decision below is correct; gives rise to no conflict of decisions; and involves no question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1945.

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firmed, 324 U. S. 9; *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895 (C. C. A. 2); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 498 (C. C. A. 3); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. 2d 612, 614 (C. C. A. 3); *National Labor Relations Board* v. *Blanton Co.*, 121 F. 2d 564, 570–571 (C. C. A. 8); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 596–597 (C. C. A. 9).

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

DEFINITIONS

* * * * *

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the em-

ployees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order

and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1945

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 231

COWELL PORTLAND CEMENT COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI

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Respondent, National Labor Relations Board, has filed herein its Brief in opposition to the Petition for Writ of Certiorari. We shall reply to said Brief under the same points as appear in our Brief in Support of the Petition.

Point A

The United States Circuit Court of Appeals erred in holding that the Board had jurisdiction in a case in which the Board's findings affirmatively declared that the employer is not engaged in commerce (as defined in the Act) and in which there is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else.

In our Brief, relying on *United Corporation v. Federal Trade Commission*, 110 Fed. (2d) 473, and *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 Fed. (2d) 673, and the cases cited by the Court in the *United Corporation* case, we submitted that the jurisdiction of the National Labor Relations Board must be decided on the facts as they existed at the time when the Board rendered its decision. As petitioner had withdrawn from all interstate commerce, both outgoing and incoming, more than two years before the Board made its decision (April 18, 1942), and as there was no finding of fact showing that petitioner's acts in any way burdened or obstructed the interstate commerce of anyone else, we submitted that the Board was without jurisdiction over petitioner and that its decision is null and void (Brief, pp. 14-29).

We then submitted that if it be held that the determinative facts are those which existed at the time *when the Board filed its complaint**, namely, May 11, 1940, the Board

(a) Because petitioner has at no time on or after March 1, 1940, been engaged *in* commerce (i.e., interstate commerce); and

(b) Because there was no evidence and no finding of fact by the Board that petitioner, not being so engaged, nevertheless by its acts burdens or obstructs

* Note: Unless otherwise stated, all italics in this brief are ours.

was likewise without jurisdiction

the interstate activities *of other businesses,* and the Act has not vested the Circuit Court of Appeals with power to supply findings of fact which the Board did not make.

We shall now consider respondent's argument in opposition, the pages being those of respondent's brief.

Page 11

At page 11 of its brief, respondent incorrectly states the petitioner's "subsidiary question" under the head of jurisdiction, which question our petition states as follows (Brief, p. 5):

> "In the case of an administrative tribunal such as the National Labor Relations Board, is the tribunal's jurisdiction to be determined on the facts which exist *at the time when the tribunal renders its decision* or *at the time when the complaint before the tribunal was filed?*"

Respondent (Brief, p. 11) states the question as though it related only to the time when the tribunal renders its decision and eliminates the alternative time *when the complaint before the tribunal was filed.*

Pages 11-12

At pages 11-12 of its brief, respondent states that on the *facts* as found by the Board, the question in our Point A does not arise. We shall show hereinafter that this contention is not tenable.

Page 12

At page 12 of its brief, respondent refers to the Board's "finding" that petitioner's discontinuance of transactions

in interstate commerce was effected "in order to avoid the consequences of its prior violation of the Act." This statement is at complete variance with all the evidence in the record on that subject.

The record shows, without any contradiction, that the sales of cement by Henry Cowell Lime and Cement Co. to points outside the State of California diminished rapidly in the years preceding 1940 (Cowell Exh. 7, 9, 11; R. 2140, 2145, 2150); that Mr. Ralph B. Mitchell, the Company's Sales Manager and Traffic Manager, repeatedly spoke to various directors and officers of the Company concerning the diminishing interstate cement sales, drew attention to the fact that said interstate business was very unprofitable and recommended that the Company get out of that business and confine its sales efforts to more remunerative territory in California (Mitchell, R. 3095-7, 3114-25); that in the early part of December, 1939, Mr. Mitchell again broached the subject to Mr. Thelen, the Company's counsel and a member of its board of directors and again recommended that the Company get out of the small remaining interstate business, whereupon Mr. Thelen asked Mr. Mitchell to prepare a statement showing the financial results of the Company's interstate sales of cement (Mitchell, R. 3095-7); that Mr. Mitchell thereupon wrote a letter, dated December 11, 1939, to the board of directors (Board Exh. 86, R. 2204-5) showing all interstate shipments of cement from January 1, 1938, to November 30, 1939, together with the financial results of said sales, showing a total net profit from the 1938 interstate sales of only 11 cents per barrel of cement and from the 1939 sales of only 3 cents per barrel; that Mr. Mitchell's letter was consid-

ered by the board of directors at a meeting held on December 19, 1939, and that the board thereupon adopted a resolution declaring that it will be the definite policy of the Company to confine its sales of cement, on and after January 1, 1940, to points within the State of California (Cowell Exh. 6, R. 2126-7; Board Exh. 85, R. 2201-4); that the board of directors of petitioner adopted a similar resolution relating to the purchase of materials and supplies (Cowell Exh. 5, R. 1930; Board Exh. 84, R. 2199-2201); and that copies of said resolutions were transmitted to the appropriate officers and employees, with instructions to comply with them, and that said resolutions, ever since January 1, 1940, have been in full force and effect (Mitchell, R. 2127; Barnett, R. 1928; Boyle, R. 3573-4).

Not one of the transcript references cited by respondent in its brief (p. 12) supports the Board's above "finding". The Board made this same claim before the Circuit Court of Appeals, which ignored the contention.

As Circuit Judge Hutcheson of the Fifth Circuit said, in *Magnolia Petroleum Co. v. National Labor Relations Board*, 112 Fed. (2d) 545, speaking of the Board's similar "findings" in that case (p. 552):

> "We think it plain that the findings in this case are based on nothing but *suspicion, surmise* and *conjecture;* that they are wholly unsupported by the evidence and that they and the order based on them cannot stand."

Pages 12-13

At pages 12-13 of its brief, respondent states that the Board found that at the time of the hearing before the Trial Examiner, in June, 1940, petitioner was still engag-

ing in substantial transactions affecting interstate commerce. Conceding that petitioner, during the first six months in 1940, made no sales of cement in interstate commerce, respondent points to materials and supplies worth $21,214.00 which originated outside of California and which moved to Cowell "during the first six months of 1940".

We shall now draw the Court's attention to the *facts* with reference to these claims.

Said sum of $21,214.00 consists of the following items:

(a) Two groups of items, amounts $3,885.00 and $951.00, total $4,836.00, which were produced or manufactured out of California but had become part of the local stocks of California dealers and were thereafter shipped from those stocks for delivery to Cowell.

The Board expressly found as a fact that these items were so shipped from California stocks (R. 494: see also Board's Exhibits 113(a) and (b), R. 3513, 3517) and further found that subsequent to February, 1940, there have been *no interstate shipments to Cowell* (R. 494).

The interstate movements in each of these cases had obviously ended when delivery was made to the seller in California and the subsequent movement to Cowell was intrastate. *

(b) Items totaling $16,378.00, weighing 313,384 pounds and consisting of 7 shipments purchased in 1939.

These are the items on which the Board principally relies in support of its claim to jurisdiction.

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* During this same period of time, materials, supplies and equipment produced or manufactured in California and worth $95,699.73 were shipped to Cowell (Board Exch. 113(c), R. 3522-38).

However, the testimony and the Board's own finding of fact show that the last of these shipments arrived at Cowell in February, 1940 and that there have been no interstate shipments to Cowell on and after March 1, 1940. The Board's own Exhibit 70 shows that all of these items arrived at Cowell during the months of January and February, 1940 (R. 2024).

Mr. Ralph B. Mitchell, Traffic Manager of Bay Point and Clayton Railroad Company, over whose line of railroad the materials and supplies moved to the cement plant at Cowell, testified that he had examined each and every freight bill during the period from January 1 to and including June 30, 1940, and that, apart from the above 7 shipments which were delivered at Cowell in January and February, 1940, he found not a single shipment which moved to Cowell from any point of origin outside the State of California (R. 3085-6). There were 492 of these freight bills, as shown on Cowell Exhibit No. 54 (R. 3088).

Mr. Mitchell also examined each receipted invoice of petitioner during the same period and testified that apart from the receipts covering the above 7 shipments said receipted invoices show no instance of any item which moved on or after January 1, 1940, to petitioner at Cowell from any point outside the State of California (R. 3088-9).

Mr. E. D. Barnett, petitioner's superintendent at Cowell, testified that he, too, had examined each of said receipted invoices and that, apart from said 7 shipments, the invoices show no shipment to Cowell, either carload or less-than-carload, after January 1, 1940 from any point outside of California (R. 2086-8).

Mr. Charles A. Graham was a field examiner of the National Labor Relations Board. He examined the records

of petitioner and of Bay Point and Clayton Railroad Company relating to all shipments of freight to and from Cowell and prepared exhibits which were introduced in evidence. Mr. Graham was not available for cross-examination as to an exhibit covering the period from January 1 to June 15, 1940, but counsel for the Board stipulated as follows (R. 3565):

> *"That if Mr. Graham were here as a witness he would testify that in his examination of the records at No. 2 Market Street, San Francisco, he found no instance of shipments of machinery, supplies and equipment originating in points outside the State of California to Cowell Portland Cement Company for the year 1940, other than those shown in the second column of Exhibit 116(b)."*

The items shown in the second column of said Exhibit 116(b) were the 7 shipments hereinbefore referred to.

Now we come to the Board's own finding of fact on this issue. On page 494 of the Record, after referring to said 7 shipments which were received at Cowell "in January and February, 1940", the Board made the following finding of fact:

> "The records of the B. P. & C. disclose *no interstate shipments thereafter* . . ."

However, *the Board's complaint was not filed until May 11, 1940.*

Thus it appears on the basis of the uncontradicted testimony and the Board's own finding of fact that all interstate shipments of petitioner, outgoing and incoming, had been completely terminated before the Board's complaint was filed. Obviously, the Board's claim to jurisdiction over

petitioner could not be justified by any claim that petitioner was engaged *in* interstate commerce.

Page 13

At page 13 of its brief, respondent says:

> "On these facts the Board concluded that petitioner's operations 'still have a close, intimate and substantial relation to' interstate commerce (R. 497)."

This is an inaccurate and misleading statement. What the Board actually found is as follows (R. 497):

> "Moreover, *the interstate shipments incident to the respondent's business which occurred in 1940* show that the respondent's operations still have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and therefore that the Act is applicable to it."

Here we have the basis of the Board's claim to jurisdiction. The Board relies on the "interstate shipments" which occurred in 1940. These are the 7 shipments above referred to, which were delivered at Cowell in January and February, 1940. The Board itself found that there were no interstate shipments after that time.

When the Board filed its complaint, two months and eleven days later, petitioner's interstate transactions had completely terminated and the Board was without jurisdiction over petitioner.

Page 14

On that state of the record, the court obviously could not sustain the Board's jurisdiction on any finding that petitioner was engaged *in* interstate commerce.

Assuming that respondent (petitioner herein) was not engaged *in* commerce after March 1, 1940 (148 Fed. (2d)

237, 241; R. 3676-77) and bearing in mind that the complaint was not filed until May 11, 1940, the court evolved a theory that the Board's jurisdiction could be upheld on another ground, namely, that petitioner's business burdened or obstructed some one else's interstate commerce. On that point, respondent's brief (p. 14) says that the Board found "also that its (petitioner's) activities burdened commerce (R. 497)". Turning to R. 497, we find that what is there said is based on Section IV of the Board's decision which reads as follows (R. 490):

> "We find that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

This is obviously only a general *conclusion* and *not* a *finding of fact.*

What commerce and *whose* commerce is claimed to be affected? The Board does not say.

As Justices Black, Douglas and Murphy pointed out in their concurring opinion in *Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643 (see our Brief in Support of Petition, pp. 14-16), there are two broad classes of cases in which the National Labor Relations Board has jurisdiction over an employer, namely,

> (a) Where the employer is engaged *in* interstate commerce; and
>
> (b) Where the employer is not so engaged but his acts burden or obstruct the interstate commerce of *some one else's business.*

And if the Board's jurisdiction is to be sustained under (b), it is incumbent upon the Board to make *findings of fact* showing who that third party is and what interstate business of his will be burdened or obstructed.

The Board has completely failed to make any such finding of fact in the present case and the Circuit Court of Appeals has no authority to supply the findings which the Board did not make (see our Brief in Support of Petition, pp. 21-2).

Pages 14-15

Finally, on the issue of jurisdiction, respondent, at pages 14-15 of its brief, says:

> "Inasmuch as the court below did not decide whether the Board's jurisdiction was to be determined as of the time of the issuance of the complaint or as of the time of the Board's decision, the issue petitioner seeks to raise is not presented and the decision below in no sense conflicts with *United Corporation v. Federal Trade Commission*, 110 F. 2d 473, 476 (C.C.A. 4) and *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 673, 685 (C.C.A. 8)."

We find ourselves unable to agree with this contention.

As we read the court's decision, the court held that the issue of jurisdiction is to be decided on the facts existing at the time when the Board's complaint was filed, on May 11, 1940 (148 Fed. (2d) 237, 241; R. 3676).

As to the second of the above two alternative times, we understand the court to have ruled adversely, on the ground that the *United Corporation* case and the *Chamber of Commerce of Minneapolis* case, on which we relied,

were not in point because the administrative tribunal there involved was the Federal Trade Commission and not the National Labor Relations Board.

While we read these cases as having been decided on broad principles of administrative law and find nothing therein indicating that it was intended to limit their effect to situations arising under the Federal Trade Commission Act, we cannot escape the conclusion that the court ruled against us on this issue and that respondent's statement to the contrary is not well founded.

In concluding on the issue of jurisdiction, our views may be stated, in a nutshell, as follows:

1. The court below erred in holding that the issue of the Board's jurisdiction over petitioner was not to be determined on the facts existing at the time of the Board's decision.

2. At the time when the Board rendered its decision (April 18, 1942) petitioner had for more than two years completely terminated all interstate transactions, both outgoing and incoming, and was not subject to the Board's jurisdiction.

3. If it be held that the Board's jurisdiction is to be determined on the facts which existed at the time the Board filed its complaint (May 11, 1940) it is likewise evident that the Board was without jurisdiction,

(a) Because petitioner has at no time on or after March 1, 1940, been engaged in commerce (i.e., interstate commerce); and

(b) Because the Board made *no finding of fact* that petitioner, not being so engaged, nevertheless by its acts was burdening or obstructing the interstate com-

merce activities *of any third party*, and the court below was without authority to supply the findings of fact which the Board did not make.

Point B

The United States Circuit Court of Appeals erred in holding that, in the case of an unfair labor practice, the Board may award back pay to a striking employee for the time during which he was on strike, even though there has been no request for reinstatement.

As we pointed out in our Brief in Support of the Petition (pp. 29-30), the following facts are material in this connection:

1. The strike declared by the C.I.O. Union on July 17, 1937, has never been revoked and is still in effect.
2. The C.I.O. Union has never made request for reinstatement of its members; and
3. Every individual member of the C.I.O. Union who has ever made request for reinstatement has been re-employed.

We may add that there are over 60 men who have been so reinstated. Their names and work records appear in Cowell Exhibit 45a (R. 3397-3420).

Respondent, in its brief, does not challenge any of these facts, all of which are uncontradicted on the record.

Respondent's brief (pp. 15-16) also concedes the well-established rule that, even though a strike is caused by an unfair labor practice of the employer, back pay will not be awarded to a striking employee for the period of his strike up to the time when he requests reinstatement.

As we point out in our Brief in Support of the Petition (p. 30), the reason underlying this rule is that, even though the strike has been caused by an unfair labor practice of the employer, such as the discriminatory discharge of employees, *a striking employee cannot, at one and the same time, both strike and receive back pay for the period of the strike.*

However, respondent claims (Brief, p. 16) that there is an *exception* to this rule where the employer has announced that he will reinstate a striking employee but only on an illegal condition, such as that he shall join a union not of his choice.

In support of that claim, respondent (Brief, pp. 16-17) lists a number of court cases. However, an examination of these cases reveals that not one of them supports respondent's claim.

In *Idaho Potato Growers, Inc. v. National Labor Relations Board,* 144 Fed. (2d) 295, and *Subin v. National Labor Relations Board,* 112 Fed. (2d) 326, there was not even a strike. Obviously, these cases are not in point.

In *National Labor Relations Board v. A. Sartorius & Co.,* 140 Fed. (2d) 203, the decision contains not a word about back pay.

In *National Labor Relations Board v. Reed & Prince Mfg. Co.,* 118 Fed. (2d) 874, 887, 888, the court affirmed an award of back pay from the date of the employer's refusal to reinstate, after request of the striking employees for reinstatement. That action was in accordance with the well-established rule on which we rely.

Neither in *National Labor Relations Board v. Carlisle Lumber Co.,* 94 Fed. (2d) 138, 99 Fed. (2d) 533, nor in

National Labor Relations Board v. Sunshine Mining Co., 110 Fed. (2d) 780, does the court discuss the question whether application by a striking employee for reinstatement is necessary in order to initiate the running of back pay. In the latter case, the court does consider the question whether, on the facts of that case, it was necessary for the striking employees to make application to get their jobs back (i.e., reinstatement) but that is an entirely different matter from *back pay.* That subject is not discussed.

The only remaining case in the group cited by respondent is *Eagle-Picher Mining & Smelting Co. v. National Labor Relations Board,* 119 Fed. (2d) 903. While it is true that the Board in that case awarded back pay to striking employees without requiring them to make application for reinstatement, the case is not in point here, because of vital differences in *evidence* and in the Board's *findings of fact.*

In the *Eagle-Picher* case, 200 striking employees took the stand and testified that it was their understanding that if they returned to work it would be necessary for them to join an employer-fostered union which was not of their choice (16 N.L.R.B. 727, 800). Based on that testimony, the Board made its finding of fact that, with certain exceptions not here relevant, "the claimants were at all times after July 5, 1935, willing to return to work in the absence of illegal conditions" (16 N.L.R.B. 727, 812). The court sustained the Board's order on the basis of that evidence and that finding (119 Fed. (2d) 903, 914, 915).

In the present case, on the other hand, *not a single striking employee took the stand and testified on this subject* and *the Board, having no evidence, could make no finding.*

We submit that the *Eagle-Picher* case has no application to the record in our case.

As respondent is relying on a claimed exception to a well-established rule, it is incumbent on respondent to show clearly the existence of the exception and its application to the record in our case. As the result of a very careful examination of the authorities, we submit that there is no court case which establishes such an exception and holds it applicable to a record such as that now before this Court.

Finally, respondent claims (Brief, pp. 17-18) that there is or should be a further exception to the rule, where a lockout is followed by a strike. In support of this claim, respondent cites *National Labor Relations Board v. Long Lake Lumber Company,* 138 Fed. (2d) 363. However, that case was decided on an entirely different issue. At page 364, the court said:

> "That single complaint is that the Board's order should have been directed against Robinson alone, it being contended that Robinson was an independent contractor and the sole employer of the men affected."

On that sole issue, the court held that the record warranted the Board's treatment of Robinson and the Lumber Company as joint employers (p. 364).

There was no issue before the court on the subject of back pay and the decision does not even once refer to the matter.

However, when we turn to the Board's decision in this case, *In re Long Lake Lumber Company,* 34 N.L.R.B. 700, an interesting situation is revealed.

The Board's decision shows that on June 7, 1939, the employer shut down his logging camp in the State of Washington under circumstances which the Board found to be a lockout (p. 707); that thereafter, on the same day, the C.I.O. Union voted to strike and established a picket line (p. 707); that on July 11, 1939, the employer came to the picket line with several men who wanted to work and made to all the strikers an offer of reinstatement which was coupled with an unlawful refusal to deal with the Union and that the strikers refused the offer because of the unlawful condition and prevented the employer from opening up (p. 709); and that within a few days thereafter, the employer reopened the camp with another crew (p. 709).

On the subject of back pay, the Board held that on the first day (June 7, 1939) "the lock-out was in existence and the strike had no effect on the situation" (p. 718). Continuing, the Board said (p. 718):

> "The strike became effective only when the respondents attempted to reopen the camp to resume operations on July 11, 1939, indicated that jobs were available for the employees, *but the respondents were prevented from so doing because of the Union picket line.*"

The Board thereupon awarded back pay to each of the strikers but only of "a sum of money equal to the amount he would normally have earned as wages *from June 7, 1939 to July 11, 1939,* less his net earnings during said period" (p. 719).

In other words, the Board awarded back pay for only the period during which it found the strike to have been ineffective. However, there having been no request for reinstatement, the Board did not award back pay for any

portion of the time, beginning on July 12, 1939, during which the strike was effective. The Board reached this conclusion notwithstanding the unlawful condition which was attached to the offer of reinstatement made by the employer on July 11, 1939.

Applying the Board's decision to the facts of the present case, we find the following situation:

The shutdown of July 16, 1937, was found by the Board to be a lockout. On July 17, the Union declared a strike. On July 18, the Union established a picket line which was maintained for many months. On July 19, petitioner's general manager desired to reopen the packing house for the packing and shipping of cement (George, R. 1280) but on that day he learned that the Union had established a picket line around the cement plant and had prevented the milkman, the baker and the vegetable man from taking food and drink to the people of Cowell. Thereupon, he decided that, in order to avoid physical violence, he would defer the reopening of the packing house (George, R. 1282-5).

In other words, the general manager was prevented from reopening the cement plant because of the Union picket line. Under the Board's reasoning in the *Long Lake Lumber Company* case, the strike became effective at that time, and no back pay can be awarded for any subsequent period while the strike remains in effect, in the absence of request for reinstatement.

As far as we know, no court has ever held that a strike accompanied by an effective picket line is ineffective merely because of a concurrent lockout.

As the strike declared by the C.I.O. Union on July 17, 1939, has never been revoked and is still in effect, and as

the Union has never made request for reinstatement of its members, and as each individual member of the Union who has ever made request for reinstatement has been re-employed, we respectfully submit that the Board's back pay order should be denied enforcement.

Point C

The United States Circuit Court of Appeals erred in holding that back pay may be awarded for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge.

In our Brief in Support of the Petition (p. 35), we pointed out that it was not until May 8, 1940, that the C.I.O. Union finally filed charges containing the necessary allegations with reference to the existence of the A. F. of L. Union and of its contract with the petitioner herein.

After drawing attention to the well-known fact that the Board's complaints are based on charges filed by complaining employees and that until proper charges are filed a proper complaint does not issue, we pointed out that the long delays prior to May 8, 1940, are the responsibility of the C.I.O. Union and that, for that reason, back pay should not, in any event, run back further than May 8, 1940 (pp. 35-6).

In seeking to meet that situation, respondent in its brief (p. 19), first draws attention to the fact that the original charge was filed on July 17, 1937, and that the A. F. of L. contract was not executed until "some time later" (August 27, 1937). The suggestion is made that the charge, consequently, could not have referred to the contract. How-

ever, respondent did not draw the Court's attention to the fact that the amended complaint, on which the first case was tried, was based *on an amended charge* (Bd. Exh. 1-g *which was filed on October 2, 1937,* more than a month after petitioner had entered into the contract of August 27, 1937, with the A. F. of L. Union. Had the C.I.O. Union chosen to do so, it could easily have set forth in said amended charge the facts which the Circuit Court of Appeals found should have been alleged *(National Labor Relations Board v. Cowell Portland Cement Company,* 108 Fed. (2d) 198).

Respondent's brief (p. 19) next states that this is plainly not a case in which delay in filing charges "lulled the employer into failure to reinstate" and alleges that that was the case of *National Labor Relations Board v. Mall Tool Co.,* 119 Fed. (2d) 700, 702, 704 on which we rely as stating the applicable rule.

However, this is putting up a straw man to knock him down. We have never claimed that the basis of the rule is that delay of the Union to file proper charges may lull the employer into failure to reinstate. Also, the court in the *Mall Tool Co.* case said nothing whatever on that subject. What the cout did say was (p. 702):

> "It is obvious that undue delay in filing charges may not only prejudice the employer but *also tend to encourage employees to await in idleness with the expectation that no matter how long they delay filing charges, they will receive compensation for all time during which they have been quiescent.*"

In conclusion on this point, the court said (p. 702):

> "The legislation contemplates that a proceeding such as this shall promote the public welfare; not

that it shall benefit private parties in respects unrelated to that welfare."

Finally, at page 20, respondent's brief takes the position that the fault for the long delays in the present case lies with the Board. That is a safe position for respondent to take, because of the well-established principle that the sins of the Board will not be visited upon the employees. However, the claim overlooks the fact that the initial and underlying fault was that of the Union in failing, until May 8, 1940, to file a proper charge.

Without a proper charge, there could be no proper complaint: and it is the employees who must shoulder the responsibility for the delays until a proper charge was filed.

It will be understood, of course, that we urge our Point C only in the event that the Court should not agree with us as to our Point B. We believe that Point B is sound and should dispose of the back pay issue.

Point D

The United States Circuit Court of Appeals erred in holding that, in a case in which the employee has received other regular and substantially equivalent employment, the Board may direct reinstatement, without any finding of fact showing that the effectuation of the policies of the Act require such reinstatement.

In *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, it appeared that the Board had found that "the effectuation of the policies of the Act patently requires" the restoration of the strikers to their status quo, irrespective of whether they had secured other regular and substantially equivalent employment and also

that the employer should take affirmative action "designed to effectuate the policies of the Act" (p. 203) and had ordered the employer to take affirmative action (including reinstatement) "which the Board finds will effectuate the policies of the act" (p. 204).

However, the Court, in the majority decision, held that these conclusions were not sufficient and ordered the case remanded.

In so holding, the Court pointed out that the remedy does not automatically flow from the Act itself (p. 193) and that it is not mechanically compelled by the Act (p. 198). The Court said that "we have no warrant for speculating on *matters of fact* the determination of which Congress has entrusted to the Board" (pp. 195-196). We understand the Court to hold that before the Board can make the challenged order, it must make adequate findings of fact on which it may base a conclusion that the order will effectuate the policies of the Act.

In the present case, the Board merely said (R. 507):

> "We find that such remedial order is necessary to assure effectively the right of self-organization to the respondent's employees and thus effectuate the policies of the Act.[79]"

Footnote No. 79 merely cites, without comment, *Matter of Ford Motor Company,* 31 N.L.R.B. 994, and a court case which is clearly irrelevant.

The Board thus used substantially the same language which this Court in the *Phelps Dodge Corporation* case found to be inadequate and insufficient.

Furthermore, *there was in the present case no evidence whatever concerning the obtaining of equivalent employ-*

ment. All such evidence was expressly deferred by reason of a stipulation (R. 507, 1891-2).

Hence, there being *no evidence,* the Board could make *no findings of fact* on that issue.

At page 21 of its brief, petitioner urges that it will be a sufficient compliance with the Court's decision in the *Phelps Dodge Corporaton* case, if the Board in some case, such as the *Ford Motor Company* case, sets forth the reasoning in support of a general policy in the matter and then, in subsequent cases, merely states a conclusion, *without any reference to the facts of that case,* and with a mere footnote citation of the case which contains said reasoning. We do not so understand this Court's decision.

At page 21 of its brief, respondent states that it is this petitioner's contention that the Board is required "to restate fully the *reasoning* behind its determination in every case." It is our contention that it is the Board's duty to find and state the facts bearing on that issue. Then can follow a conclusion which, we believe, will be upheld if it follows the facts, without any elaborate statement of reasoning.

At page 21 of its brief, respondent further states that an argument similar to that of petitioner was rejected by the Court in *Republic Aviation Corporation v. National Labor Relations Board,* No. 226, 1944 Term, decided April 23, 1945. We have read this case carefully and have been unable to find therein any reference whatever to the matter of securing regular and substantially equivalent employment.

While there are a number of decisions of United States Circuit Courts of Appeals which seem to support the re-

spondent's position on this issue, we believe that they arise from a misconception of what this Court decided in the *Phelps Dodge Corporation* case, and that it would be appropriate for the Court to advise the bench and bar, in the present proceeding, of the effect of that case, particularly where the record contains no evidence whatever and no finding of fact in support of the Board's conclusion.

It is respectfully submitted that the writ should issue.

Dated: San Francisco, California,
September 18, 1945.

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